Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-818

ADELINE KARIJOLIC,

*Petitioner,*

v.

ILLINOIS BELL TELEPHONE COMPANY,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

L. BOW PRITCHETT
STEPHEN S. SCHULSON
THOMAS H. W. SAWYER
225 West Randolph St., Suite 27B
Chicago, Illinois 60606
(312) 727-4541

*Attorneys for Respondent*

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Illinois Bell Telephone Company files this brief in opposition to Adeline Karijolic's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the district court and the order of the Court of Appeals affirming the judgment of the district court are not officially reported. Both are reprinted in the appendix to the petition.

## JURISDICTION

The jurisdictional basis for this appeal is adequately set forth in the petition.

## STATUTE INVOLVED

This case involves the Age Discrimination in Employment Act of 1967, 29 U.S.C. §623, as it existed prior to the 1978 Amendment. The language of this provision prior to the 1978 Amendment is set forth in Appendix A.

## RESTATEMENT OF QUESTION PRESENTED

Whether the district court properly decided that this case presented no genuine issue of material fact and that defendant was entitled to judgment as a matter of law.

## STATEMENT OF THE CASE

In October, 1976, the Irving office of Respondent in Chicago, Illinois, where petitioner had worked as a telephone operator, was closed. As a result, Petitioner was transferred to another Chicago office known as the Hanson Park office (Petition, App., p. 3a). She was placed in training since the work at Hanson Park differed from that she had performed at Irving (Petition, App., p. 4a). Subsequently, Petitioner was advised that she had not passed this training. Respondent then transferred her to its Ontario TSPS office, also located in Chicago, and trained her for a TSPS operator job. Again Petitioner was informed she did not successfully pass the training (Petition, App., p. 4a).

Petitioner was then offered a job at an operator office in Wheaton, Illinois, a Chicago suburb. This job was to last until the Wheaton office closed in late 1977. The Wheaton job involved the same work Petitioner had performed at the Irving office. She at first accepted the job offer, but subsequently decided not to accept the job (Petition, App., p. 4a).



After Petitioner declined the Wheaton job offer, she was placed on retirement with a service pension by Respondent's Benefit Committee, effective February 8, 1977. Pursuant to Respondent's pension plan, Petitioner receives monthly pension payments of $215.51. In addition, as a retiree, she receives medical, dental and life insurance coverage at a monthly cost to the Respondent of $119.13 (Appendix B, p. A4-A5).

Respondent's pension plan has been in effect continuously since its adoption in 1913. The plan is applicable to all employees and is a qualified plan within the meaning of section 401 of the Internal Revenue Code, 26 U.S.C. §401. During 1976 alone, a total of $44,472,000 in pension benefits was paid out under the plan. Since its adoption, the plan has provided for involuntary retirement, at the option of the Company, of employees who, as is true of Petitioner, have reached the age of 50 years and have at least 25 years of service (Appendix B, p. A4).

As a result of her involuntary retirement, Petitioner filed suit against Respondent alleging that her termination was the result of age discrimination. Respondent filed a motion for summary judgment, supported by affidavit, averring that Petitioner's retirement came within the ambit of Section 4(f)(2) in that Petitioner was retired in observance of the terms of a bona fide retirement plan which is not a subterfuge to evade the purposes of the Act. The district court rendered summary judgment in favor of Respondent. On appeal the judgment of the district court was affirmed by the Court of Appeals for the Seventh Circuit.

## REASONS FOR DENYING THE WRIT

### I.

### THIS CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Contrary to Petitioner's assertion this case does not present an important question of federal law which has not been, but should

be, settled by this Court. Petitioner's retirement was effective on February 8, 1977. In *United Airlines, Inc. v. McMann,* 434 U.S. 192 (1977), this Court held that Section 4(f)(2), as it existed at that time,[1] permitted pre-age 65 retirement, based on age, pursuant to a bona fide retirement plan which is not a subterfuge to evade the purposes of the Act. Effective April 6, 1978, Section 4(f)(2) was amended to preclude involuntary retirement based on age even if done pursuant to a bona fide retirement plan which is not a subterfuge. Pub. L. 95-256, §2(a), Apr. 6, 1978, 92 Stat. 189. As a result of this Amendment, a decision of this Court on the instant case would have no effect whatsoever on any case arising on or after April 6, 1978.

This Court has indicated that in the exercise of "sound judicial discretion", a petition for certiorari is granted only in cases "involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . . ." *Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 79 (1954). In *Rice* a writ of certiorari was dismissed as improvidently granted on the sole basis that the passage of a new Iowa law precluded the issue presented by that case from again arising in that state. In *District of Columbia v. Sweeney,* 310 U.S. 631 (1940), this Court denied certiorari on the basis that the tax which was the subject of that case had been "laid under a statute which has been repealed and the question is therefore not of public importance." 310 U.S. at 631. In the subject case a change in the law has similarly negated any public importance which might otherwise have existed. Therefore review by this Court is not warranted.

There is another reason why review of the instant case by this Court is unwarranted. This Court has in *McMann*, already enunciated the criteria to be applied in determining the applicability of Section 4(f)(2) as it existed prior to the 1978 Amendment. There

[1]Pub. L. 90-202, §4(f)(2), Dec. 15, 1967, 81 Stat. 603.



is no reason for the Court to do so again. The instant case was decided by the courts below in conformity to the rationale of *McMann.* In *McMann* this Court held not only that involuntary retirement of employees before age 65 was permitted under the pre-amended Act, but also that the Act was intended to protect bona fide retirement plans which are not a subterfuge to evade the purposes of the Act. Under this Court's holding where a retirement plan met the criteria of being bona fide and not a subterfuge, Section 4(f)(2) provided an exception from the prohibitions against age discrimination contained in the Act.

In determining that summary judgment for Respondent was appropriate, the district court carefully applied the criteria enunciated in *McMann* to the undisputed facts of the instant case. Petitioner conceded in the district court that Respondent's retirement plan was bona fide (Petition, App., p. 6a). With regard to the issue of subterfuge, the district court noted that Respondent's plan had since 1913 provided for retirement, at the option of the Company, of persons of Petitioner's age and years of service (Petition, App., p. 4a). According to *McMann* provisions of a retirement plan adopted long before the Act was enacted cannot be a subterfuge to evade the Act. 434 U.S. at 203. Thus, the district court properly concluded the provision of Respondent's plan involved in the instant case was not a subterfuge.

*McMann* did not involve, and thus this Court did not explicitly decide, the question of whether Section 4(f)(2) protection extended to early retirement which was at the option of the employer rather than required by the terms of the plan. However, the courts of appeal which have decided the issue have held, without conflict, that the reasoning of the *McMann* decision logically extends to such early retirements. *Zinger v. Blanchette,* 549 F.2d 901 (3rd Cir. 1977), *cert. denied,* 434 U.S. 1008 (1978); *Rogers v. Exxon Research and Engineering Company,* 559 F.2d 834 (3rd Cir. 1977), *cert. denied,* 434 U.S. 1022 (1978), *Marshall v. Hawaiian Telephone Company,* 575 F.2d 763 (9th Cir. 1978);

*Minton v. Whirlpool Corporation,* 569 F.2d 1012 (7th Cir. 1978).[2] The courts below adopted the same position.

In *Zinger v. Blanchette,* 549 F.2d 901 (3d Cir. 1977), *cert. denied,* 434 U.S. 1008 (1978), an employee was involuntarily retired prior to age 65 pursuant to a retirement plan which allowed the employer, at its option, to retire employees between the ages of 60 and 65. The employee claimed that in choosing to retire him the employer had discriminated against him in violation of the Act. The Third Circuit Court of Appeals, in deciding that case for the employer, stressed the "clear measurable difference between outright discharge and retirement. . . ." 549 F.2d at 905. The court noted that this distinction was reflected in the language of the statute in that discharge because of age was explicitly prohibited but that "[n]o statutory provision explicitly prohibits early retirement on a pension." 549 F.2d at 905.

The *Zinger* court found that a distinction between retirement on a pension and discharge was also reflected in the legislative history of the Act. At subcommittee hearings on the age bill former Secretary of Labor Willard Wirtz tertified that the prohibitions of the bill, which were later incorporated into the Act, were "to extend to individuals in situations *not* covered by established retirement policies. . . ." (Emphasis added). 549 F.2d at 906. Representatives of organized labor testifying at the hearing interpreted the bill as permitting "involuntary retirement of employees under 65 . . . regardless of the age of the employee, subject only to the limitation that the retirement policy or system in effect may not be merely a subterfuge to evade the Act." 549 F.2d at 906-07. In addition, the court relied on the fact that an

[2]In *Marshall v. Hawaiian Telephone,* 575 F.2d 763 (9th Cir. 1978), the court observed that a contrary interpretation would result in an absurdity:

> Were we to adopt the Secretary's approach, we would be advancing the anomalous position that [the employer] would not have violated the Act by forcing retirement on all employees at age 60 but would have violated it by allowing some of them to work past that age. We cannot accept such a result. 575 F.2d at 767.



interpretive bulletin, issued by the Department of Labor nearly contemporaneously with the passage of the Act, interpreted the Act as permitting involuntary retirement "irrespective of age" whether or not the retirement was at the employer's option.[3]

On the basis of the Act, its legislative history, and the contemporaneous interpretation of the Department of Labor, the *Zinger* court held that Congress' intent was not only to prohibit discriminatory hiring and discharge policies but also to protect retirement plans.

In *McMann,* this Court quoted with approval the language in the *Zinger* opinion distinguishing between retirement and discharge as follows:

> There is, however, a clear, measurable difference between outright discharge and retirement, a distinction that cannot be overlooked in analyzing the Act. * * * Congress continued to regard retirement plans favorably and chose therefore to legislate only with respect to discharge. 434 U.S. at 198.

This distinction was, apparently, one upon which this Court relied heavily in reaching its decision in *McMann.* This same distinction provided the ground of decision in *Zinger*; *Marshall v. Hawaiian Telephone Company,* 575 F.2d 763 (9th Cir. 1978); *Minton v. Whirlpool Corporation,* 569 F.2d 1012 (7th Cir. 1978); and in the courts below.

Petitioner claims that even if the foregoing is a proper statement of the law the amount of her retirement benefits is so

[3]The pertinent section of the interpretive bulletin issued by the Department of Labor provided that:

> [T]he Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of Section 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar as the exception contained in Section 4(f)(2) is concerned. 34 F.R. 9709 (1969).

insubstantial that there is an issue of fact as to whether Respondent's plan, as applied to her, was a subterfuge to evade the purposes of the Act. Thus, according to Petitioner, summary judgment should not have been granted (Petition, p. 12).

Petitioner's claim flies in the face of this Court's decision in *McMann.* There the term "subterfuge", as used in the Act, was held to have its ordinary meaning of a "scheme, plan, stratagem, or artifice of evasion." 434 U.S. at 203. The record contains no hint that Respondent changed its plan so as to reduce benefits payable to older persons after the Act was passed. Nor is there any indication in the record that Respondent attempted to avoid its obligation to provide Petitioner with all the benefits she was entitled to under its retirement plan. Therefore, Petitioner clearly cannot establish the existence of a subterfuge within the meaning of the Act as construed by this Court in *McMann.*

Moreover, the benefits paid to Petitioner under Respondent's retirement plan are not so insubstantial as to amount to a discharge in disguise. Under its plan, Respondent is obligated to provide benefits to Petitioner amounting to $334.64 per month for the rest of her life. In ten years time, Respondent must, under the terms of its retirement plan, pay Petitioner over $40,000. This is clearly sufficient to establish that Petitioner's termination was a retirement and not a discharge. Thus, under the rationale of *McMann,* and its progeny, Petitioner's retirement was not covered by the prohibitions of the Act.

## II.

## NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED BY PETITIONER'S CLAIM THAT THE 1978 AMENDMENT APPLIES TO PETITIONER'S 1977 RETIREMENT

Petitioner claims that the 1978 Amendment to the Act should be applied to her 1977 retirement. Petitioner argues that this



Court's decision in *Bradley v. Richmond School Board,* 416 U.S. 696 (1974), requires this result. Petitioner points to one district court decision which supports her argument. *Davis v. Boy Scouts of America,* 457 F. Supp. 665 (D.N.J. 1978).[4] There is no court of appeals decision which conflicts with the determination of the Seventh Circuit in the instant case, that the 1978 Amendment does not apply to a 1977 retirement.

This Court's decision in *Bradley* involves facts which are very different from those in the instant case. Moreover, even if the *Bradley* rationale is utilized in this case, it is clear that the 1978 Amendment should not be applied to a retirement occurring in 1977.

In *Bradley* the issue was the entitlement of the plaintiffs in a school desegregation case to reasonable attorneys' fees. While this issue was pending on appeal Congress enacted a statute providing for the award of attorneys' fees to prevailing plaintiffs in school desegregation cases. In holding that the newly enacted statute should be applied to entitle plaintiffs to attorneys' fees, this Court emphasized the fact that this would involve "no change in the substantive obligation of the parties." 416 U.S. at 493. In the instant case, the issue is precisely what are the substantive obligations of Respondent under the Act. The 1978 Amendment has resulted in a major change in the substantive obligations of Respondent under the Act vis-a-vis the substantive obligations as judicially determined under the unamended Act. Thus, the *Bradley* rationale has no application to the instant case.

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[4]There is no court of appeals decision, other than that of the Seventh Circuit herein, which involves this issue. The majority of district courts which have considered the issue have rejected applying the 1978 Amendment to pre-amendment retirements. *Marshall v. Delaware River and Bay Authority,* 471 F. Supp. 886 (D. Del. 1979); *Marshall v. The Baltimore and Ohio Railroad Company,* 461 F. Supp. 362 (D. Md. 1978); *Marshall v. Atlantic Container Line,* 18 FEP Cases 1167 (S.D.N.Y. 1978).

Moreover, even if the *Bradley* principle is applied it is clear that the decision of the Seventh Circuit Court of Appeals holding that the 1978 Amendment does not apply to this case is correct. The principle stated in *Bradley* is as follows:

> [A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. 416 U.S. at 711.

In the instant case the legislative history establishes beyond doubt that Congress did not intend that the 1978 Amendment be applied to retirements which occurred prior to the effective date of that Amendment.

Senator Williams, the floor and conference manager of the 1978 Amendment, in reply to a question about the effect of the Amendment on a retirement which occurred before the effective date of the Amendment, answered as follows:

> The bill is not retroactive. The question of mandatory retirements prior to the effective date of this bill will be determined by the court's interpretation of existing law. 123 Daily Cong. Rec. A17304, October 19, 1977.

The House Committee report reflects the same view. The report contains a table indicating when the various prohibitions contained in the Amendment take effect. The report indicates that the prohibition against pre-age 65 mandatory retirement takes effect "upon enactment." H. R. Rep. No. 537, 95th Cong., 1st Sess. 9 (1977). Petitioner's argument that the 1978 Amendment applies to this case ignores the clear intent of Congress.

Even without regard to this clear expression of a contrary Congressional intent the 1978 Amendment should not be applied to this case. This Court recognized in *Bradley* that a newly enacted law or amendment may not be applied to a case which arose prior to enactment where to do so would result in "manifest



injustice." 416 U.S. at 491. This is precisely such a case. Respondent in planning its personnel actions was certainly entitled to rely on those judicial and administrative interpretations of Section 4(f)(2) which ultimately were determined by this Court to be correct. A change in Respondent's obligations after the fact, which potentially exposes Respondent to substantial civil liability for conduct judicially determined to be lawful when it occurred, would amount to manifest injustice.

## CONCLUSION

For all of the reasons above stated, Respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

L. Bow Pritchett
Stephen S. Schulson
Thomas H. W. Sawyer
225 West Randolph St., Suite 27B
Chicago, Illinois 60606
(312) 727-4541

*Attorneys for Respondent*

# APPENDIX A

## STATUTES INVOLVED

### AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

**§623. Prohibition of age discrimination**

**Employer practices**

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * *

**Lawful practices; age as occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause**

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement,

pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for good cause.

Pub. L. 90-202, §4, Dec. 15, 1967, 81 Stat. 603.



## APPENDIX B

**UNITED STATES DISTRICT COURT**
**FOR THE**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

ADELINE KARIJOLIC,
*Plaintiff,*
v.
ILLINOIS BELL TELEPHONE COMPANY
*Defendant.*

**CIVIL ACTION**
**NO. 77 C 1951**

### AFFIDAVIT OF JOHN E. HERRON

John E. Herron, being first duly sworn, on oath deposes and states as follows:

1. My name is John E. Herron. I reside at 4247 Harvey Avenue, Western Springs, Illinois. Since May 1, 1971, I have been employed as the Assistant Secretary, Employees' Benefit Committee (hereinafter called the "Committee") with the Illinois Bell Telephone Company.

2. Illinois Bell Telephone Company's Plan for Employees' Pensions, Disability Benefits and Death Benefits (hereinafter called the "Plan"), which is applicable to all employees, is funded solely by the Company and is administered by the Committee. The Plan is a qualified pension plan within the meaning of Section 401 of the Internal Revenue Code.

3. As Assistant Secretary of the Committee I have general responsibility, under the direction of the Secretary of the Committee, for all benefit matters acted upon and approved by the Committee. Such matters include the retirement of employees on a pension. I have responsibility as custodian of documents, papers, and other records of the Plan and the Committee. I also have responsibility for record keeping, including statistics, concerning action taken by the Committee under the Plan.

4. During the period from January 1, 1976 through December 31, 1976, a total of $110,637,498 was paid into the pension fund of the Plan. During the same period a total of $44,472,000 in pension benefits was paid out under the Plan.

5. Section 4.1 of the Plan, entitled "Pensions," provides, inter alia, that the Committee has the option to retire employees who have reached the age of 50 years and who have a term of employment of at least 25 years. A true and correct copy of the Plan which was in effect at the time of the retirement of Adeline Karijolic, the plaintiff herein, has been attached as Exhibit A.

6. The Plan has continuously been in effect since its adoption on January 1, 1913. A true and correct copy of the original Plan has been attached as Exhibit B. The Plan as initially adopted, provided in Section 1, that employees who meet the particular age and length of service requirements specified (e.g., 50 years old with 25 years of service) could be retired at the option of the Company. This provision continued unchanged until January 1, 1946, when the Plan was amended so that the approval of the Committee rather than the President or Vice-President was required to retire an employee at the option of the Company. A true and correct copy of this provision as it read after the change in 1946 is attached as Exhibit C. The present language of Section 4.1(a) was adopted on October 1, 1971. A true and correct copy of the provision as amended in 1971 is attached as Exhibit D.

7. In accordance with the terms of Section 4.1, the Committee placed Adeline Karijolic on retirement, effective February 8, 1977, on a service pension.



8. Adeline Karijolic's monthly pension payment under the Plan is currently $215.51. In addition, as a retiree, Ms. Karijolic receives the following benefits:

| Benefits | Monthly Cost to the Company |
|---|---|
| Basic Medical Expense Insurance | $ 81.08 |
| Dental Plan | 11.91 |
| Extraordinary Medical Expense Insurance | 21.34 |
| Group Life Insurance | 4.80 |
| Total | $119.13 |

The foregoing statements are all true to my best knowledge, information and belief.

/s/ JOHN E. HERRON

John E. Herron

SUBSCRIBED and SWORN to before me this day of December, 1977.

*Notary Public*